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Working Group on
Electronic Data Interchange
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ELECTRONIC DATA INTERCHANGE

Proposal by the United Kingdom of Great Britain and Northern Ireland

Note by the Secretariat

1. At the twenty-fifth session of the Working Group, the delegation of the United Kingdom made a number of proposals for the drafting of the uniform rules on the legal aspects of electronic data interchange being prepared by the Working Group. Those suggestions dealt with the conditions in which alternative means might be deemed to satisfy legal requirements for: (1) an instrument in writing; (2) signature; and (3) the production of an original document (see A/CN.9/373, paras. 60, 76 and 91).

2. Following the twenty-fifth session of the Working Group, the Secretariat received from the delegation of the United Kingdom a revised set of proposals, with explanatory notes. The draft rules proposed by the United Kingdom together with the explanatory notes are reproduced in the annex to this note as they were received by the Secretariat.

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ANNEX

A. Writing

(1) Where, by virtue of any enactment or rule of law, certain legal consequences of any matter are determined by reference to whether information is recorded in writing or in legible form, it shall be sufficient for the purpose of that enactment or rule if the information is recorded in such a manner as to be capable of being produced in the form of [textual or other] visual images which:

(i) precisely correspond to that information; and

(ii) are no less satisfactory for any relevant purpose that would be served if the information had been recorded in writing or in legible form.

(2) Where it is necessary for the purpose of any enactment or rule of law or any question of evidence that a record be produced in writing or in legible form, it shall be sufficient for that purpose if a record of information recorded in the manner described in paragraph (1) above is produced in the form of [textual or other] visual images which satisfy sub-paragraphs (i) and (ii) of that paragraph.

B. Authentication

(1) This article applies where the signature of any person is of significance for the purpose of any enactment or rule of law, any question of evidence, any contract or any other matter.

(2) In this article, an "authentication" means any device which purports to indicate by whom a communication or record was made or issued and that person's approval of the information contained therein.

(3) An authentication which purports to have been applied by or on behalf of the person whose signature is relevant shall be sufficient for the purpose in question in place of signature if:

(i) it is evidence that it was applied by that person or its agent (whether or not authorized for the purpose); and

(ii) as such evidence, is no less reliable than signature, or (except where signature would otherwise be required by law) is as reliable as was appropriate in all the circumstances to the purpose for which the record or communication was made.

(4) Insofar as it applies in relation to any enactment or rule of law, paragraphs (1) to (3) above may not be excluded or modified by any legally enforceable undertaking or agreement.

C. Transactions effected by signed writing

(1) This article applies where, by virtue of any enactment or rule of law, the legal effect of any transaction is determined by reference to whether it is effected by writing and signature.

(2) A record, which by virtue of articles A and B above is to be treated as sufficient for the purpose of any condition as to writing and signature which applies to a transaction referred to in paragraph (1) above, shall be taken to confer on the transaction such legal effect as would be conferred by writing and signature only as from the time when the record is in a form which complies with sub-paragraphs (i) and (ii) of Articles A(1) and B(3).

D. Requirement of an original

(1) This article applies where:

(i) it is necessary for the purpose of evidence or of any enactment or rule of law that an original record be produced; and

(ii) information has been recorded other than in the form of visual images.

(2) In any legal proceedings it shall be sufficient for the purpose of the application of any rule of evidence referred to in paragraph (1)(i) above that the record sought to be adduced in evidence is the best evidence that the person adducing it could reasonably be expected to obtain; but nothing in this paragraph shall affect any question as to the weight to be accorded to that evidence.

(3) Subject to paragraph (2) above, it shall be sufficient for any purpose referred to in paragraph (1)(i) above if a record is produced in a form:

(i) the information in which precisely corresponds to the information originally recorded; and

(ii) which is no less satisfactory for any relevant purpose that would be served by the production of an original record.

E. Information corresponding to the original recording

(1) For the purpose of Articles A and D above, a record shall be taken to be in a form the images or information in which correspond precisely to the information as it was recorded if, notwithstanding any alternation in the form of the record, the content of the information originally recorded has been precisely replicated.

(2) For the purpose of paragraph (1) above, unless the contrary is shown, the content of the information shall be presumed to have been precisely replicated if the ultimate record derives from the original recording by an unbroken chain or reproduction, and at all material times the following remained unaltered:

(i) the original recording;

(ii) the ultimate record in question; and

(iii) any intermediate reproduction of the original recording, from which the ultimate record was directly or indirectly reproduced.

[F. Exclusions

Articles A to E above do not apply for the purpose of any enactment or rule of law or any question of evidence insofar as those articles relate to a negotiable instrument or a share certificate.]

G. Burden of proof

Where an issue arises as to whether any condition in Articles A, B, D or E above is satisfied, it is (subject to paragraph (2) of Article E) for the person who claims that the paragraph is satisfied to show that it is.

Notes on UK Draft

Generally

The rules under consideration by the Working Group fall into two distinct categories.

One set of rules deals with the conditions in which legal requirements for writing, signature and an original document may be taken to be satisfied by alternative means. The UK draft only covers rules of this kind. In this category also (but not addressed by the UK version) would fall provisions about the evidential admissibility and weight of records generated by or stored in a computer.

For the purpose of this category of rules, no definition of EDI or electronic transmission is necessary. Neither is any internationality test necessary. The matters dealt with by the rules are necessarily more general in scope: they are concerned with the legal formalities which apply to records and communications generally. They are not merely concerned with regulating the relationship between sender and recipient, but rather with independent statutory and other legal requirements. It is for consideration whether this category of rules might be treated separately as "Part I" of any Model Law.

The second category (which would then become "Part II") might consist of rules governing the relationship between sender and recipient: e.g. the extent to which a sender of an electronic communication is to be taken to have approved the content of that message if it purports to be authenticated by him, the time when a message is to be taken to be received, the consequences of failing to acknowledge receipt when requested to do so etc. If any definition of EDI or internationality is necessary, it is only relevant to this part of the Model Law.

Writing: Article A

Paragraph (1) deals with requirements that information be recorded in writing; paragraph (2) deals with requirements that written records be produced (e.g. in court or to administrative authorities). In the first case, it is sufficient if the information is recorded in such a manner as to be capable of being produced in the form of visual images which satisfy conditions (i) and (ii). In the second case the record produced must satisfy conditions (i) and (ii), and not merely be "capable" of doing so. Article G puts the burden of showing that these conditions are satisfied on the person who claims that they are.

Condition (i) requires an assurance as to the integrity of the record from the time that the information was recorded. This is necessary, because, in contrast to the case where the information is originally recorded in writing, a computer print-out is unlikely to have been made at the time that the information was recorded. Furthermore, it is likely to be more difficult to detect (from a computer print-out) that the electronic recording has been altered in the interval between the time that the information was recorded and the time that the record (the computer print-out) was produced. Article E applies for the purpose of interpreting condition (i).

Condition (ii) of Article A(1) is a condition as to "functional equivalence". It is essentially directed at excluding the operation of paragraph (1) in circumstances where a paper document has certain functions which could not be fulfilled by an electronic record. It is true that many of these may be capable of specific exclusion: for example, cheques and other negotiable instruments. There may, however, be other cases where a paper document is required because what is needed is a record that is capable of delivery. In some cases it may be that what is required is something capable of endorsement (in the sense of signature on the reverse side of the written document); and there may be requirements for sealing or other formalities which presuppose a paper document. Condition (ii) would also require the visual images produced to be legible to the same extent as the written document would have been. It is a question of fact in each case whether the alternative (electronic) record serves all the functions which the requisite paper document was intended to serve.

Authentication: Article B

This article precludes any objection (whether by the recipient of a message, the authorities enforcing a requirement of public law or a third party) that the message was not signed, if it was authenticated in a manner no less reliable than signature. It applies in relation to requirements for signature which are imposed by law or by any contract, and to the need for signature for the purpose of any question of evidence or any other matter.

The article distinguishes in one respect between (i) requirements of law, and (ii) any other need for signature. In relation to requirements of law, the condition specified in sub-paragraph (ii) is that the authentication is "no less reliable than signature". For any other purpose, however, it will be sufficient, where it cannot be shown that the authentication was no less reliable than signature, if it can instead be shown that the authentication is as reliable as was appropriate in all the circumstances to the purpose for which the record or communication was made. This distinction is necessary, because in relation to requirements of law neither party should be free to substitute its own criteria of reliability in place of the standard required by the law, whereas in other contexts the appropriate standard of reliability may depend on the circumstances.

The words in condition (i) "(whether or not authorized for the purpose)" refer to the possibility that an officer, employee or other appointed agent of a company may not be authorized to sign or authenticate a particular manager on behalf of the company; the rule does not affect any issue as to whether he is authorized for that purpose.

Article G puts the onus of showing that the authentication was no less reliable than signature on the person who claims that it was, if the issue is disputed.

(Note that putting the burden of proof on the person claiming that the authentication was no less reliable than signature does not affect the operation of any principle of estoppel as against a sender who seeks to escape from a contract or other obligation on the grounds that he never actually signed the message (although it was authenticated by him). Where the recipient is unable to show that the sender's authentication was no less reliable than signature, or that it was as reliable as was appropriate for the relevant purpose, it would still be possible for the recipient to rely upon any estoppel that would otherwise apply against a sender who has authenticated the message).

Paragraph (4) is drafted on the assumption that the Model Law will include a general provision to the effect that, except as otherwise provided, the rights and obligations of a sender or recipient under the rules contained in the Model Law may be varied by their agreement.

Transactions effected by signed writing: Article C

This deals with the case where a legal transaction can only be validly effected by signed writing. It ensures that a condition as to signed writing is only satisfied by virtue of articles A and B as from the time when the information is in a form which satisfies the conditions in those articles. The situation contemplated is where (i) the existing law states that a transaction is only valid if it is in writing and the written document is signed, and (ii) a particular transaction is effected informally and only subsequently recorded by an authenticated computer record. In such a case, Article C prevents articles A and B having the effect that the computer record could retrospectively (as from the date of the transaction) have the same legal effect as would have been conferred by signed writing at that date. It should only have that legal effect as from the time when the authenticated electronic record exists.

Requirement of an original: Article D

Paragraph (2) applies for the purpose of the rules of evidence which apply to proceedings in court. It makes it clear that evidence will not be excluded on the grounds that it does not consist of an original document, provided that the best evidence rule is satisfied. The weight of any document admitted in this manner is left to the court to assess, and this article does not affect that assessment.

Paragraph (3) applies for the purpose of (i) requirements of law generally (as distinct from rules of evidence applicable to proceedings in court) and (ii) any question of evidence outside court. It is subject to the rule in paragraph (2) about the rules of evidence which apply in court.

Condition (i) provides an assurance as to the integrity of the record as from the time that the information was recorded. This condition is interpreted by Article E.

Condition (ii) is a condition as to the "functional equivalence" of the record sought to be produced. Condition (ii) is necessary because the purpose of the requirement for an original may not be merely as an assurance of the authenticity or integrity of the information. It may also be required for some other purpose, for example as a protection against the fraudulent re-use of a document which entitles the bearer to claim payment, or as an assurance that title has not previously been transferred to another person. Again, it is a question of fact whether the electronic document serves all the functions which the requisite paper document was intended to serve.

Assurance as to the integrity of the record: Article E

This article applies for the purpose of interpreting articles A and D. It provides a test as to the integrity of a record since the time that the information was recorded. It distinguishes between an alteration to the form of the record and an alteration to the content of the information recorded. Only the latter should be regarded as detracting from the integrity of the information.

Article G puts the onus of showing that these conditions are satisfied on the person who claims that they are, but if it can be shown that the conditions in paragraph (2) are satisfied, a rebuttable presumption arises that the condition in paragraph (1) is satisfied. The process of reproduction referred to in paragraph (2) may be the production of a computer print-out, or it may be the photographic copying of this print-out.

(Note that any altered record may also satisfy the requirement for an original, but it will only be an authentic record of the original information as amended. This reflects the ordinary position with documents in writing. For example, where an agreement in writing has been varied, the record of the variation may be as much as "original" as the record of the initial agreement; but it will only be an original record of the variation, not of the initial agreement).

Exclusions: Article F

This article excludes negotiable instruments and share certificates from the application of these rules. In the context of negotiable instruments, requirements for writing, signature and an original document serve an additional purpose. Signature may be a method of transferring title by means of endorsement. The requirement for an original provides an assurance that title has not previously been transferred to a third party.

It is considered that this article is not strictly necessary in view of condition (ii) of Articles A(1) and D(1), and for that reason it appears in square brackets. The Working Group will wish to consider (a) whether it is desirable to make specific exclusions of this kind or whether it is preferable to rely on condition (ii); and (b) if there are to be specific exclusions, whether the list should be extended.